No. 82-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT F. FEHLHABER, as Personal Representative of Fred Robert Fehlhaber, deceased,

Petitioner,

—v.—

VERONE MARIN FEHLHABER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

PETITIONER'S REPLY BRIEF

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I

This Case Presents Significant and Unresolved Questions of Constitutional Due Process

Respondent asks this Court to shut its eyes to grave violations of petitioner's due process rights for the same reason erroneously adopted by the Fifth Circuit. Respondent maintains that because Fred was sent formal *notice* of the California proceedings, the $10 million California default judgment is immune from constitutional scrutiny, and that the federal

courts are powerless to correct the "egregious" errors committed in this case.

But, unlike the Fifth Circuit, the Supreme Court has never accepted mere notice as a proxy for due process. This Court recently emphasized that "even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, '[r]edetermination of the issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.' *Montana* v. *United States*, 440 U.S. 147, 164 n.11 (1979)." *Haring* v. *Prosise*, ____ U.S. ____, 103 S. Ct. 2368, 2375 (1983). Surely there is "reason to doubt" the quality, extensiveness and fairness of the procedures followed in this litigation, which the Court of Appeals branded "a case of injustice."

The Fifth Circuit's decision—affirming a summary judgment, issued without discovery—is untrue to the spirit of Supreme Court precedent, and flatly conflicts with *Compton* v. *Alton Steamship Co.*, 608 F.2d 96, 107 (4th Cir. 1979), where the Fourth Circuit recognized the centrality of "fundamental fairness and considerations of justice" to constitutional due process. *See* Pet. at 16-17.[1] Respondent, like the courts below, has failed to cite a *single* case upholding a judgment infected with constitutional errors of the magnitude presented

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1 Respondent erroneously attempts to distinguish *Compton* on the ground that no "collateral attack" was involved there. (Res. Br. at 10-11.) Respondent ignores *Compton's* holding that the judgment before it was "void as a matter of law," 608 F.2d at 107, and therefore subject to collateral attack. By contrast, the Fifth Circuit found the California judgment merely *voidable*, and subject only to direct attack. That distinction, which respondent overlooks, is of paramount importance here. Nor may *Compton* be meaningfully distinguished because it involved a federal, rather than a state, court judgment. (Res. Br. at 11 n.12.) As this court held last term, federal due process principles apply to both state and federal judgments. *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982).

here—errors which go to the fundamental power of the California court to act.

Review by this Court is necessary to set right this "case of injustice." Fred is the victim of respondent's gross overreaching and the "egregious" errors of a California judge *pro tem*, leading to a $10 million judgment which far exceeded his net worth. This Court should not permit such an abuse.

Review is also warranted to clarify constitutional issues of general importance. This Court has not ruled on recurring issues of due process and full faith and credit in marital litigation for over 25 years. *See Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). Nor has it *ever* ruled upon the constitutional limits on the application of state community property law to foreign property.

Respondent's brief does not come to grips with these significant issues. Instead, she attempts to make light of the shocking errors in the California proceedings, going so far as to call this case, which so troubled the Court of Appeals, a "simple collection proceeding"! (Res. Br. at 8.)

These glib arguments are not based upon any evidence in the record in this case. To the contrary, respondent relies upon allegations which she *concedes* "do not appear of record" (*id.* at 4 n.3), and which bear no relation to anything in the proceedings conducted below or in California. It is settled law that review in this Court is strictly confined to the record compiled below. *Thomson* v. *Gaskill*, 315 U.S. 442, 446-47 (1942) (Frankfurter, J.). Although respondent displays her pique at our presentation of "disputed" facts (Res. Br. at 4 n.4), she ignores the fact that, on summary judgment, all inferences must be drawn in favor of *petitioner*. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). There is no excuse for respondent's eleventh-hour attempt to change the record.

In any case, neither the unsworn and undocumented assertions of respondent's counsel, nor her other arguments, suc-

ceed in explaining away the three major due process violations committed here:

1. *Lack of Any Evidence to Support the Default Judgment.* Our petition showed that the California court acted without receiving *any* proof as to the existence, identity, or amount of the alleged marital property. Respondent presented, and the California court blindly accepted, a list of Fred's alleged assets which *on its face* lists and counts twice millions of dollars of the same securities. Respondent counters with the sudden discovery that her asset list was allegedly based upon extra-record "evidence" which respondent never saw fit to present in California, or to the district court in this case, or to the Fifth Circuit. (Res. Br. at 17.) We know of no "evidence" which supports the distortions in respondent's asset list. Nor could any evidence, inside or outside the record, conceivably support counting millions of dollars of identical securities twice. Respondent's submission to the California court was an outright fraud.

Respondent argues in the alternative that these falsehoods are now *res judicata* because Fred "failed" to respond to her request to admit the accuracy of the asset list. However, under California procedure, a party in default is "out of court," and therefore *barred* from responding to such a request. *Mackie* v. *Mackie*, 186 Cal. App. 2d 825, 9 Cal. Rptr. 173, 178 n.5 (1960). *Accord*, *J.M. Wildman, Inc.* v. *Stults*, 176 Cal. App. 2d 670, 1 Cal. Rptr. 651, 654 (1959). As respondent concedes, the rule of *Jones* v. *Moers*, 91 Cal. App. 65, 266 P. 821 (1928) "operates to exclude parties." (Res. Br. at 18, n.18.) Yet, only an active party is capable of making a binding judicial admission. It follows that any response to the request for admissions filed by Fred would have been void.[2] The absence of a response from Fred is not a substitute for evidence.

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2 Respondent points out that a non-party may sometimes be required to respond to discovery requests. (Res. Br. at 18-19.) However, in California practice, a request for admissions is *not* a discovery device. *Hillman* v. *Stultz*, 263 Cal. App. 2d 848, 70 Cal. Rptr. 295, 317 (1968);

2. *Failure to Divide the Property in Kind.* On this point, respondent, like the Fifth Circuit, relies primarily upon *Badillo* v. *Badillo*, 123 Cal. App. 3d 1009, 177 Cal. Rptr. 56 (1981). However, *Badillo* is inapposite because it did not involve an all-cash award remotely similar to the judgment at issue here. *Badillo* was a garden-variety marital action, where the court awarded cash in lieu of a *particular* asset which could not practicably be divided.

Respondent next contends inaccurately that petitioner is "in error" in arguing that "no California case can be found that would support a cash award of community property." (Res. Br. at 24, n. 23.) This argument is a straw man. We never argued that a cash award is improper in all circumstances. California courts routinely award cash to balance particular assets which—unlike the property allegedly involved here—cannot practicably be divided. It is upon just such cases that respondent relies in her brief. *See, e.g., Badillo, supra*; *Weinberg* v. *Weinberg*, 67 Cal. 2d 557, 63 Cal. Rptr. 13, 432 P.2d 709 (1967); *Emmett* v. *Emmett*, 109 Cal. App. 3d 753, 169 Cal. Rptr. 473 (1980). We *do* maintain that the all-cash award issued to respondent was—and remains—totally unprecedented in California jurisprudence. Respondent fails to identify any case which calls our position into question. The California judgment clearly exceeded any relief which could reasonably have been expected by a defendant in default.

3. *The Application of California Community Property Law to Out-of-State Property.* The petition demonstrated that the California court exceeded its subject matter jurisdiction by purportedly applying California law to Fred's Florida and New York property. Here again respondent embarks on an extra-

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Haseltine v. *Haseltine*, 203 Cal. App. 2d 48, 21 Cal. Rptr. 238, 247 (1962). The federal rule is similar. *Kantor* v. *Cycles Peugeot, S.A.*, 36 F.R. Serv. 2d 230 (D.R.I. 1983) (compliance with request for admission is "akin to filing of an answer," and not "a discovery proceeding"). A request for admissions thus may not be addressed to, or responded to by, a party in default.

record excursion, claiming—contrary to the evidence—that Fred and Verone "lived in California for many years." (Res. Br. at 27.) Unsworn assertions by respondent's counsel do not make it so. The record establishes conclusively that the parties did *not* have the close connections with California required under the *Roesch* test. *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1978), *cert. denied*, 440 U.S. 915 (1979). *See* Pet. at 14-16.[3]

This "egregious error" is not a mere mistake correctible only on direct appeal. The California court's attempt to adjudicate rights in foreign property was an action beyond the limits of its subject matter jurisdiction (both because Fred did not join in the request and because he was not domiciled in California) which cannot be accorded full faith and credit. As this Court recently reaffirmed in *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691 (1982), a default judgment issued by a court lacking subject matter jurisdiction is *always* subject to collateral attack.

In short, notwithstanding respondent's attempt to sanitize the record, the constitutional errors of the California court are manifest. That court acted without receiving any evidence; exceeded the prayer by issuing an unprecedented all-cash award; and overstepped its constitutional power by applying

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3 Respondent makes a curious argument that "residence" is equal to "domicile" under California law, and that the first prong of the *Roesch* test is therefore satisfied. Respondent concedes by her silence that the second requirement of *Roesch*—a decision by *both* spouses to seek alteration of their marital status in a California court—is absent. Moreover, respondent's equation of domicile and residence is based upon a misreading of *Cooper* v. *Cooper*, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439 (1969). *Cooper* merely states that for one purpose one-year's residence is equivalent to "domicile" in that it gives a state constitutional power to alter the plaintiff's marital status, but *not* to adjudicate property rights of the parties. *See Whealton* v. *Whealton*, 67 Cal. 2d 656, 660, 63 Cal. Rptr. 291, 432 P.2d 979 (1967). As this Court has recognized, the power to award a divorce is fundamentally distinct from the power to determine rights in alleged marital property. *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). Accordingly, *Roesch* explicitly requires more than mere residence before a California court may assert jurisdiction over foreign property.

California law to foreign property. We submit that "fundamental fairness and considerations of justice" demand that this tainted judgment not be awarded full faith and credit. A writ of certiorari should issue so that this Court can rectify the constitutional violations committed here, review the significant questions presented in the record, and resolve the conflict between the Fifth and Fourth Circuits.

II

Respondent's Reliance on Alleged Evidence Outside the Record Highlights The Impropriety of Summary Judgment

The petition showed that the sensitive constitutional issues in this case should not have been disposed of against Fred on summary judgment, especially over Fred's pleas for discovery on crucial issues. Respondent's heavy reliance on allegations outside the record graphically proves our point. When the prevailing party must stray so far from the record to try to support a ruling in her favor, *a fortiori*, summary judgment is improper. If "it was clearly appropriate for the district court to enter summary judgment on the basis of the record before it," as respondent asserts (Res. Br. at 28), then why didn't she stick to that record in her brief?

Significantly, respondent's alleged extra-record "evidence" apparently pertains to the very areas in which petitioner sought discovery—the parties' connections with California, the extent and nature of the alleged marital property, and the distortions in respondent's submissions to the California court. Discovery on these matters would have enabled Fred to make a record on the quasi-community property issue—the same issue which the Fifth Circuit held presented questions of fact which should have been resolved in the trial court.[4] Under basic principles of

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4 Respondent suggests (Res. Br. at 8, n.10) that Fred's right to take discovery was satisfied by a staged deposition of respondent conducted in California by her own attorneys. That suggestion is ludicrous. Fred noticed a deposition of respondent to be held in Florida, the jurisdiction in which respondent filed this action. At respondent's behest, the trial court delayed the deposition until seven days before trial. Under

due process, Fred certainly was entitled to take discovery on the merits before entry of a judgment against him for $10 million plus interest.

The "lethal weapon" of summary judgment, *Brunswick Corp.* v. *Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967), was improperly and unfairly deployed in this case. If the Court declines to order full review, certiorari should be granted and the case remanded to the district court, pursuant to 28 U.S.C. § 2106, to give petitioner a fair opportunity to present this case on a full factual record.

Dated: New York, New York
August 10, 1983

Respectfully submitted,

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the district court's order, Fred clearly had a right to take that deposition in the event summary judgment was not granted in his favor. By disposing of this case short of trial, the district court deprived Fred of his fundamental right to discovery on the merits.